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In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-166

RICHARD JOYCE SMITH, TRUSTEE OF THE PROPERTY OF THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY, DEBTOR, APPELLANT

v.

UNITED STATES OF AMERICA, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

BRIEF FOR THE FEDERAL APPELLEES[1]

OPINION BELOW

The opinion of the three-judge district court (J. App. 9–81)[2] is not yet reported.

JURISDICTION

The order of the three-judge district court (J. App. 82–83) was entered on June 25, 1974. The notice of appeal (J. App. 385) was filed on July 3, 1974, and

[1] This brief is submitted on behalf of all federal parties other than the United States Railway Association, a federally-established nonprofit corporation, which is represented by separate counsel.

[2] "J. App." refers to the Joint Appendix lodged in this Court.

the jurisdictional statement was filed on August 23, 1974. The jurisdiction of this Court is invoked under 28 U.S.C. 1252.[3]

QUESTIONS PRESENTED

1. Whether appellant's claim that the Rail Act will effect a taking of his trust property without just compensation is ripe for adjudication.

2. Whether the creditors of the debtor railroads or the railroads themselves are constitutionally entitled to receive cash under the Rail Act.

3. Whether the absence of any provision for a prior judicial determination of the fairness and equity of the consideration to be paid for the debtor railroads' rail properties renders the Rail Act invalid.

4. Whether the Rail Act is invalid as a geographically nonuniform law on the subject of bankruptcies.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Article I, § 8, cls. 3 and 4 of the Constitution in pertinent part provides:

> The Congress shall have Power * * *
>
> * * * * * *
>
> To regulate Commerce with foreign Nations, and among the several States * * *;
>
> To establish * * * uniform Laws on the subject of Bankruptcies throughout the United States; * * *.

The Fifth Amendment to the Constitution in pertinent part provides:

---

[3] By stipulation of counsel for the parties, and in the interest of expeditious consideration of the merits of this case, we are lodging this brief in advance of the noting of probable jurisdiction, which we do not oppose.

> No person shall be * * * deprived of * * * property, without due process of law; nor shall private property be taken for public use, without just compensation.

Sections 207, 208, 209, and 303 of the Regional Rail Reorganization Act of 1973, Pub. L. 93–236, 87 Stat. 985, 998–1000, 1005–1008, in pertinent part provide:[4]

> Section 207(b) Within 120 days after the date of enactment of this Act each United States district court or other court having jurisdiction over a railroad in reorganization shall decide whether the railroad is reorganizable on an income basis within a reasonable time under section 77 of the Bankruptcy Act (11 U.S.C. 205) and that the public interest would be better served by continuing the present reorganization proceedings than by a reorganization under this Act. Within 60 days after the submission of the report by the Office, under section 205(d)(1) of this title, on the Secretary's report on rail services in the region, each United States district court or other court having jurisdiction over a railroad in reorganization shall decide whether or not such railroad shall be reorganized by means of transferring some of its rail properties to the Corporation pursuant to the provisions of this Act. Because of the strong public interest in the continuance of rail transportation in the region pursuant to a system plan devised under the provisions of this Act, each such court shall order that the reorganization be

[4] The Rail Act in its entirety is set forth at J. App. 393–431.

proceeded with pursuant to this Act unless it (1) has found that the railroad is reorganizable on an income basis within a reasonable time under section 77 of the Bankruptcy Act (11 U.S.C. 205) and that the public interest would be better served by such a reorganization than by a reorganization under this Act, or (2) finds that this Act does not provide a process which would be fair and equitable to the estate of the railroad in reorganization in which case it shall dismiss the reorganization proceeding. * * *

(c) Within 420 days after the date of enactment of this Act, the executive committee of the Association shall prepare and submit a final system plan for the approval of the Board of Directors of the Association. * * * The submission shall reflect evaluation of all responses and summaries of responses received, testimony at any public hearings, and the results of additional study and review. Within 30 days thereafter, the Board of Directors of the Association shall by a majority vote of all its members approve a final system plan * * *. * * *

Section 208(a) The Board of Directors of the Association shall deliver the final system plan adopted by the Association to both Houses of Congress and to the Committee on Interstate and Foreign Commerce of the House of Representatives and the Committee on Commerce of the Senate. The final system plan shall be deemed approved at the end of the first period of 60 calendar days of continuous session of Congress after such date of transmittal unless either the House of Representatives or the Senate passes a resolution during such

period stating that it does not favor the final system plan.

(b) If either the House or the Senate passes a resolution of disapproval under subsection (a) of this section, the Association, with the cooperation and assistance of the Secretary and the Office, shall prepare, determine, and adopt a revised final system plan. Each such revised plan shall be submitted to Congress for review pursuant to subsection (a) of this section. * * *

Section 209(a) Notwithstanding any other provision of law, the final system plan which is adopted by the Association and which becomes effective after review by the Congress is not subject to review by any court except in accordance with this section. After the final system plan becomes effective under section 208 of this title, it may be reviewed with respect to matters concerning the value of the rail properties to be conveyed under the plan and the value of the consideration to be received for such properties.

(b) Within 30 days after the date of enactment of this Act, the Association shall make application to the judicial panel on multi-district litigation authorized by section 1407 of title 28, United States Code, for the consolidation in a single, three-judge district court of the United States of all judicial proceedings with respect to the final system plan. Within 30 days after such application is received, the panel shall make the consolidation in a district court (cited herein as the "special court") which the panel determines to be convenient to the parties and the one most likely to be able to conduct any proceedings under this section

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with the least delay and the greatest possible fairness and ability. * * *

(c) Within 90 days after its effective date, the Association shall deliver a certified copy of the final system plan to the special court and shall certify to the special court—

(1) which rail properties of the respective railroads in reorganization in the region and of any railroad leased, operated, or controlled by such railroads in reorganization are to be transferred to the Corporation, in accordance with the final system plan;

(2) which rail properties of the respective railroads in reorganization in the region or railroads leased, operated, or controlled by such railroads in reorganization are to be conveyed to profitable railroads, in accordance with the final system plan;

(3) the amount, terms, and value of the securities of the Corporation (including any obligations of the Association) to be exchanged for those rail properties to be transferred to the Corporation pursuant to the final system plan, and as indicated in paragraph (1) of this subsection; and

(4) that the transfer of rail properties in exchange for securities of the Corporation (including any obligations of the Association) and other benefits is fair and equitable and in the public interest.

* * *

Section 303(a) Within 10 days after delivery of a certified copy of a final system plan pursuant to section 209(c) of this Act—

(1) the Corporation, in exchange for the rail properties of the railroads in reorganization in the region and of railroads leased, operated, or controlled by railroads in reorganization in the region to be transferred to the Corporation, shall deposit with the special court all of the stock and other securities of the Corporation and obligations of the Association designated in the final system plan to be exchanged for such rail properties;

(2) each profitable railroad operating in the region purchasing rail properties from a railroad in reorganization in the region, or from a railroad leased, operated, or controlled by a railroad in reorganization in the region, as provided in the final system plan shall deposit with the special court the compensation to be paid for such rail properties.

(b)(1) The special court shall, within 10 days after deposit under subsection (a) of this section of the securities of the Corporation, obligations of the Association, and compensation from the profitable railroads operating in the region, order the trustee or trustees of each railroad in reorganization in the region to convey forthwith to the Corporation and the respective profitable railroads operating in the region, all right, title, and interest in the rail properties of such railroad in reorganization and shall itself order the conveyance of all right, title, and interest in the rail properties of any railroad leased, operated, or controlled by such railroad in reorganization that are to be conveyed to them under the final system plan

as certified to such court under section 209(d) of this Act.

(2) All rail properties conveyed to the Corporation and the respective profitable railroads operating in the region under this section shall be conveyed free and clear of any liens or encumbrances, but subject to such leases and agreements as shall have previously burdened such properties or bound the owner or operator thereof in pursuance of an arrangement with any State, or local or regional transportation authority under which financial support from such State, or local or regional transportation authority was being provided at the time of enactment of this Act for the continuance of rail passenger service or any lien or encumbrance of no greater than 5 years' duration which is necessary for contractual performance by any person of duties related to public health or sanitation. Such conveyances shall not be restrained or enjoined by any court.

(3) Notwithstanding anything to the contrary contained in this Act, if railroad rolling stock is included in the rail properties to be conveyed, such conveyance may only be effected if the profitable railroad operating in the region or the Corporation to whom the conveyance is made assumes all of the obligations under any conditional sale agreement, equipment trust agreement, or lease in respect to such rolling stock and such conveyance is made subject thereto; and the provisions of this Act shall not affect the title and interests of any lessor, equipment trust trustee, or conditional sale vendee or assignee under such conditional sale agreement, equipment trust agreement or lease

under section 77(j) of the Bankruptcy Act (11 U.S.C. 205(j)).

(4) Notwithstanding anything to the contrary contained in this Act, if a railroad in reorganization has leased rail properties from a lessor that is neither a railroad nor controlled by or affiliated with a railroad, and such lease has been approved by the lessee railroad's reorganization court prior to the date of enactment of this Act, conveyance of such lease may only be effected if the Corporation or the profitable railroad to whom the conveyance is made assumes all of the terms and conditions specified in the lease, including the obligation to pay the specified rent to the non-railroad lessor.

(c)(1) After the rail properties have been conveyed to the Corporation and profitable railroads operating in the region under subsection (b) of this section, the special court, giving due consideration to the findings contained in the final system plan, shall decide—

(A) whether the transfers or conveyances—

(i) of rail properties of each railroad in reorganization, or of each railroad leased, operated, or controlled by a railroad in reorganization, to the Corporation in exchange for the securities and the other benefits accruing to such railroad as a result of such exchange, as provided in the final system plan and this Act, and

(ii) of rail properties of each railroad in reorganization, or of each railroad leased, operated, or

controlled by a railroad in reorganization, to a profitable railroad operating in the region, in accordance with the final system plan,

are in the public interest and are fair and equitable to the estate of each railroad in reorganization in accordance with the standard of fairness and equity applicable to the approval of a plan of reorganization or a step in such a plan under section 77 of the Bankruptcy Act (11 U.S.C. 205), or fair and equitable to a railroad that is not itself in reorganization but which is leased, operated, or controlled by a railroad in reorganization; and

(B) whether the transfers or conveyances are more fair and equitable than is required as a constitutional minimum.

(2) If the special court finds that the terms of one or more exchanges for securities and other benefits are not fair and equitable to an estate of a railroad in reorganization, or to a railroad leased, operated, or controlled by a railroad in reorganization, which has transferred rail properties pursuant to the final system plan, it shall—

(A) enter a judgment reallocating the securities of the Corporation in a fair and equitable manner if it has not been fairly allocated among the railroads transferring rail properties to the Corporation; and

(B) if the lack of fairness and equity cannot be completely cured by a reallocation of the Corporation's securities, order the Corporation to provide for the trans-

fer to the railroad of other securities of the Corporation or obligations of the Association as designated in the final system plan in such nature and amount as would make the exchange or exchanges fair and equitable; and

(C) if the lack of fairness and equity cannot be completely cured by reallocation of the Corporation's securities or by providing for the transfer of other securities of the Corporation or obligations of the Association as designated in the final system plan, enter a judgment against the Corporation.

(3) If the special court finds that the terms of one or more conveyances of rail properties to a profitable railroad operating in the region in accordance with the final system plan are not fair and equitable, it shall enter a judgment against such profitable railroad. If the special court finds that the terms of one or more conveyances or exchanges for securities or other benefits are fairer and more equitable than is required as a constitutional minimum, then it shall order the return of any excess securities, obligations, or compensation to the Corporation or a profitable railroad so as not to exceed the constitutional minimum standard of fairness and equity.

(4) Upon making the findings referred to in this subsection, the special court shall order distribution of the securities, obligations, and compensation deposited with it under subsection (b) of this section to the trustee or trustees of each railroad in reorganization in the region who conveyed right, title, and interest in rail

properties to the Corporation and the respective profitable railroads under such subsection.

(d) A finding or determination entered pursuant to subsection (c) of this section may be appealed directly to the Supreme Court of the United States in the same manner that an injunction order may be appealed under section 1253 of title 28, United States Code: *Provided*, That such appeal is exclusive and shall be filed in the Supreme Court not more than 5 days after such finding or determination is entered by the special court. The Supreme Court shall dismiss any such appeal within 7 days after the entry of such an appeal if it determines that such an appeal would not be in the interest of an expeditious conclusion of the proceedings and shall grant the highest priority to the determination of any such appeals which it determines not to dismiss.

The Tucker Act, 28 U.S.C. 1491, provides in pertinent part:

> The Court of Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort. * * *

STATEMENT

The facts are set forth at pages 6–13 of the United States' brief as appellant in *United States of America,*

et al. v. *Connecticut General Insurance Corp., et al.*, No. 74–168.[5]

SUMMARY OF ARGUMENT

I

Appellant's claim that the Rail Act will effect a taking of his trust property without just compensation is not ripe for adjudication. The harm with which appellant claims he is threatened under the Rail Act is remote and speculative, and uncertainties attending the operation of the Act make it impossible to evaluate his claim of future injury. Mandatory conveyance of Penn Central's rail properties under the Rail Act rests upon three major contingencies—reversal of the reorganization court's order making the Penn Central's rail properties unavailable for inclusion in the final system plan, formulation of a final system plan including those properties, and congressional approval of such a plan. Furthermore, there is at present no factual basis for evaluating appellant's contention. The following critical facts are not yet knowable: (1) the rail properties to be transferred under the final system plan; (2) the value of those properties; (3) the value of the consideration to be received in return; (4) whether the claims of secured creditors will be paid in full; (5) the form of the consideration to be paid to secured creditors.

[5] The government's appeal in No. 74–168 is from a judgment of the United States District Court for the Eastern District of Pennsylvania in three consolidated civil actions (Nos. 74–189, 74–1107 and 74–1149). Appellant Smith was the plaintiff in No. 74–1107 in the district court and is before this Court as an appellee in No. 74–168.

Appellant will have a later and better opportunity to litigate his claim that the Rail Act effects an uncompensated taking of his trust property. That issue may be litigated under the Tucker Act in the Court of Claims after completion of the proceedings under the Rail Act. But if this Court determines to the contrary that the Tucker Act remedy will not be available, appellant would in any event be able to raise his claims in the special court following congressional approval of the plan.

II

Neither the creditors of the debtor railroads nor the railroads themselves are constitutionally entitled to receive cash under the Rail Act. The Act provides for the integrated reorganization of an entire regional railroad system through an effective merger of bankrupt railroads into the Consolidated Rail Corporation; as such it operates as a reorganization statute under which creditors have no constitutional right to payment of their claims in cash.

Although the federal government may temporarily participate in the management of the Corporation, that participation will not transform the Corporation into a governmental enterprise. Thus the transfer of rail properties to the Corporation clearly effects only a merger, not a taking by a federal instrumentality.

Nor does the mandatory nature of the merger take the Rail Act out of the constitutional ambit of reorganization legislation. It is well established that a plan of reorganization providing for a continuation of rail services may be imposed upon a bankrupt railroad

without securing the consent of its owners and creditors.

But even if the Rail Act operates as a condemnation statute, as appellant contends, the Corporation is not constitutionally required to pay cash in exchange for the debtor railroads' rail properties. Money is not the only constitutionally permissible form of compensation for Fifth Amendment takings. Under the Rail Act the debtor railroads simply contribute rail properties to the Corporation in exchange for indirect ownership of and claims against those same properties, and that continued interest in the rail properties themselves is the full and perfect equivalent for the property taken.

III

After the completion of the proceedings under the Rail Act, the estates of the debtor railroads will be entitled to recover any constitutional deficiency under the Tucker Act in the Court of Claims. Due process therefore does not require a preconveyance judicial determination of the fairness and equity of the consideration to be paid for the rail properties. If such a determination is required, however, it may be secured from the special court.

IV

The Rail Act is not invalid as a geographically nonuniform law on the subject of bankruptcies. The Act applies uniformly to all reorganizations of operating railroads, and the fact that those reorganizations happen to be located in the northeastern section of

the nation does not violate the requirement of geographical uniformity. Moreover, that requirement bars only geographical discrimination against creditors, and the Rail Act contains no such discrimination. The Act may in any event be sustained as a proper exercise of commerce power.

ARGUMENT

I

APPELLANT'S CLAIM THAT THE RAIL ACT WILL EFFECT A TAKING OF HIS TRUST PROPERTY WITHOUT JUST COMPENSATION IS NOT RIPE FOR ADJUDICATION

Appellant is the trustee of the estate of the New York, New Haven and Hartford Railroad Company, which is a secured creditor of the Penn Central Transportation Company.[6] His principal argument in this litigation is that any transfer of the Penn Central's rail properties in exchange for stock and securities of the Consolidated Rail Corporation, obligations of the United States Railway Association, and other property pursuant to Section 303 of the Regional Rail Reorganization Act of 1973, Pub. L. 93–236, 87 Stat. 1005–1008, will effect a taking of his trust property for public use without just compensation. Appellant bases this argument upon two separate contentions: that the value of the consideration received by the Penn Central estate will as a factual matter prove to

[6] The New Haven estate holds secured mortgage bonds in the amount of $34,025,800 and also possesses an equitable lien which appellant asserts (Br. 24, n. 21) is equivalent to a secured claim.

be constitutionally insufficient in amount (Br. 61–83); and that payment of the consideration in stock and securities violates the New Haven estate's alleged constitutional right to have their claims satisfied in cash (Br. 52–60, 84–87). The district court concluded that these contentions were not ripe for adjudication, and we agree.

The doctrine of "ripeness" is principally a flexible rule of judicial discretion and convenience. It is of course true that litigants occasionally raise issues that are so premature and speculative that they present no actual case or controversy within the Article III jurisdiction of the federal courts. See, *e.g., Roe* v. *Wade,* 410 U.S. 113, 127–129. But more commonly prematurity is a merely discretionary nonconstitutional ground for avoiding "passing on questions of public law * * * that are not immediately pressing." *Eccles* v. *Peoples Bank,* 333 U.S. 426, 432. Ripeness is relied upon as a decisional ground perhaps most frequently in constitutional litigation, for "[t]he Court will not 'anticipate a question of constitutional law in advance of the necessity of deciding it.'" *Ashwander* v. *Tennessee Valley Authority,* 297 U.S. 288, 346 (concurring opinion of Justice Brandeis). See also, *Joint Anti-Fascist Refugee Committee* v. *McGrath,* 341 U.S. 123, 154–155 (concurring opinion of Justice Frankfurter). Thus this Court has often dismissed suits raising constitutional claims that could equally well be asserted at a later point without undue prejudice to the particular plaintiffs. See, *e.g., Golden* v. *Zwickler,* 394 U.S. 103; *Communist Party* v. *Sub-*

versive Activities Control Board, 367 U.S. 1; *United Public Workers* v. *Mitchell,* 330 U.S. 75.

Appellant's claim of an uncompensated taking does not appear to present even that minimal concreteness required of a case or controversy under Article III.[7] But certainly appellant has failed to meet the standard of greater concreteness required for the exercise of discretionary federal declaratory judgment jurisdiction. See, *e.g., Poe* v. *Ullman,* 367 U.S. 497. As we now show, it is presently both inappropriate and unnecessary to consider appellant's claim of an uncompensated taking in view of (1) the manifold uncertainties that still attend the future operation of the Rail Act with respect to the Penn Central and its secured creditors and (2) the availability of later and better opportunities for review of the questions appellant raises here.

1. Appellant's suit on behalf of the New Haven estate proceeds from a concern that a forced conveyance of the Penn Central's rail properties will result in injury to the Penn Central's creditors. But several contingencies and uncertainties render that concern purely speculative and make it impossible to give meaningful consideration to appellant's claims. Appellant is unable to show either that the Penn Cen-

[7] Certainly appellant's claim is presented in a more abstract manner than that of the plaintiff in *Epperson* v. *Arkansas,* 393 U.S. 97, upon which he relies. The plaintiff in *Epperson* was a schoolteacher compelled by her school district to teach the principles of biological evolution, in violation of the state statute which she challenged (393 U.S. at 100). In contrast, as we discuss further below (pp. 19–20, *infra*), it is not now known whether the conveyance provisions of the Rail Act will ever be applicable to the Penn Central.

tral's rail properties will be transferred pursuant to the Rail Act or that the terms of any such transfer would be unfair.

It has not yet been judicially determined that those rail properties will be available for inclusion in the final system plan. To the contrary, the reorganization court has determined, in the language of Section 207 (b) of the Rail Act, that the Penn Central shall not "be reorganized by means of transferring some of its rail properties to the Corporation pursuant to the provisions of this Act." *In the Matter of Penn Central Transportation Co.*, E.D. Pa., Bky. No. 70–347, Order No. 1596, decided July 1, 1974. The government disagrees with that determination and has taken an appeal to the special three-judge court established under Section 209(b) of the Act. But it was obviously appropriate for the district court below to refuse to consider appellant's constitutional challenge while he was successfully litigating elsewhere to remove the Penn Central in its entirety from the operation of the Act.

Moreover, even if the special court on review holds that the Penn Central's rail properties will be available for inclusion in the final system plan, it will not be known whether those rail properties will be subject to mandatory conveyance until such a plan is formulated pursuant to Section 206 of this Act.[8] The parties have stipulated only that inclusion of some Penn Central rail properties in the final system plan is "likely". J. App. 318–319.

[8] A bill (S. 4003) has been introduced to extend by 120 days the deadline for submitting the final system plan to Congress. See 120 Cong. Rec. S16619 (daily ed., September 16, 1974).

Furthermore, once the final system plan is formulated it must be submitted for review by Congress pursuant to Section 208 of the Act, and under the terms of that provision either house may by majority vote reject the plan so submitted and require the formulation of a new plan.[9] Thus mandatory conveyance of Penn Central's rail properties under the Rail Act rests upon three major contingencies—reversal of the reorganization court's order making the rail properties unavailable for inclusion in the final system plan, formulation of a plan including those properties, and congressional approval of that plan.

But even assuming that some of Penn Central's rail properties are transferred to the Corporation under an effective final system plan, there is no factual basis for evaluating appellant's contention that such a transfer would result in an uncompensated taking of his trust property. Indeed, there is at present no basis for assuming even that the Penn Central estate itself, let alone its secured creditors, would be injured by such a transfer. The parties have stipulated (J. App. 319):

> It will not be possible to ascertain until completion of the planning and approval process required by the Act
>
> (i) which rail properties of Penn Central will be designated for transfer or conveyance * * *;

---

[9] Whether such a one-house veto is constitutional is not wholly free of doubt. See our supplemental brief in *Train* v. *City of New York*, No. 73–1377, and *Train* v. *Campaign Clean Water, Inc.*, No. 73–1378.

> (ii) the liquidation value of properties designated in the final system plan for transfer * * *; * * * or
>
> (iv) the value of the consideration which will be exchanged for properties designated in the final system plan for transfer * * *.

Moreover, appellant makes his claim only on behalf of a secured creditor of the Penn Central estate. See note 6, supra. A constitutional inadequacy in the consideration paid to Penn Central might not affect creditors at all. As we indicated in our opening brief in No. 74–168 (pp. 30–31, 70–72), it appears that the Penn Central estate will be sufficient to cover all valid claims of creditors. Certainly there is no basis for assuming that priority claimants, such as the New Haven estate, will receive less than full satisfaction.

Until at least some of these uncertainties are resolved, no court will be able to pass intelligently on appellant's claim that the Rail Act will effect an uncompensated taking of his property. Nor is there any reason to consider at this time appellant's contention that secured creditors of the Penn Central estate are entitled to payment of their claims in cash. Although Penn Central will not receive cash in exchange for the rail properties it transfers to the Corporation, secured creditors of the Penn Central may receive cash or its equivalent. Cash in substantial amounts may be available, because the Rail Act contemplates that some of the debtor railroads' rail properties may be sold to profitable railroads or state and local governments, or may be abandoned and sold for scrap. See Sections 206(c)(1)(B), 303(c)(1)(A)(ii), 304(a), (b), and

(c)(2)(C), and 403(a). Consideration for the rail properties to be transferred to the Corporation will be payable in part in federally guaranteed debt instruments of the Association (see Sections 206(d), 210(b), and 303(c)(2)(B)) and possibly also of the Corporation (see Section 206(i)). Accordingly, it is possible that priority claimants would be awarded payment in cash and readily salable debt instruments essentially equivalent to cash.

In short, the harm with which appellant claims he is threatened under the Rail Act is remote and speculative, and the uncertainties attending the operation of that Act make it impossible to evaluate his claim of future injury. Appellant does not seriously dispute this. Instead, he rests his plea for immediate judicial attention on the contention that "a later opportunity for judicial intervention to prevent an unconstitutional taking will never effectively exist" (Br. 25). We now turn to a discussion of that contention.

2. Appellant will have a later and better opportunity to litigate his claim that the Rail Act effects an uncompensated taking of his trust property. That issue, as we have already shown in our opening brief in No. 74–168 (pp. 39–48), may be litigated in the Court of Claims after completion of the proceedings under the Rail Act. But if this Court determines to the contrary that the Tucker Act remedy will not be available, appellant would be able to raise his constitutional claims in the special court established under Section 209(b) of the Act following congressional approval of the plan.

Appellant contends that such relief is barred by Section 303(b)(2) of the Rail Act, which provides that the conveyance of rail properties pursuant to the final system plan "shall not be restrained or enjoined by any court."[10] But as the court below evidently recognized (J. App. 53, 82), that provision does not by its terms bar an injunction against the certification of a final system plan pursuant to Section 209(c) of the Act. Nor would it appear to bar an injunction prohibiting the corporation from depositing its securities with the special court pursuant to Section 303(a). Thus the special court, if necessary, would have adequate power to protect prospectively against an uncompensated taking.

Many of the uncertainties that make it infeasible to review appellant's constitutional contentions in the instant litigation will be resolved by the time the Association submits the final system plan to Congress for its review. Since it will at that time be known which of Penn Central's rail properties will be transferred to the Corporation and for what consideration, it may then be possible, as it is not now, to make a reasonably accurate determination of whether an uncompensated taking will occur and, if so, whether

[10] Appellant also suggests (Br. 26) that a future decision by the special court on the question whether the process under the Rail Act satisfies the statutory standard of fairness and equity may be *res judicata* on the constitutional question he seeks to raise here. But it is clear that although the judgment of the special court may collaterally estop the parties from relitigating factual issues, it would not bar the future litigation of different legal issues. See A.L.I., *Restatement of the Law of Judgments*, §§ 68, 70 (1942).

the New Haven estate will on that account receive less than the face value of its claims.

3. If this Court concludes that the Tucker Act will not afford an adequate remedy for uncompensated takings under the Rail Act, and also determines that the question of the quantitative sufficiency of the consideration to be paid to the Penn Central estate is ripe for adjudication, the Court should remand to the district court for the taking of evidence. That question cannot be decided on the present record, which is, for the reasons discussed above (pp. 20–22, *supra*), necessarily silent as to many pertinent facts.[11]

On the other hand, appellant's contention that Penn Central's secured creditors are constitutionally entitled to receive payment of their claims in cash rather than securities and other property poses a purely legal question which, if ripe, this Court would be able to decide without requiring the district court to take any further evidence. We therefore now turn to a discussion of the merits of that contention.

II

NEITHER THE CREDITORS OF THE DEBTOR RAILROADS NOR THE RAILROADS THEMSELVES ARE CONSTITUTIONALLY ENTITLED TO RECEIVE CASH UNDER THE RAIL ACT

Appellant contends (Br. 52–60, 84–87) that Section 303 of the Rail Act, which provides for payment of

[11] Appellant's related argument that the Penn Central will be entitled to the "highest and best use" value of its rail properties (Br. 77–83) is purely abstract and does not furnish a reason for invalidating the Rail Act. Decision on that question should therefore also be reserved at least until the rail properties to be transferred under the Rail Act have been identified.

stock, securities, and other property in exchange for the rail properties of the debtor railroads, violates the constitutional right of the New Haven estate, as a creditor of one of the debtor railroads, to receive payment of its claim in cash. The short answer to that contention is that the form of the payment made to a debtor railroad does not interfere with any alleged right of its creditors to receive payment of their claims in cash; if the creditors are, as appellant contends, entitled to payment in cash, the reorganization courts can sell the stock, securities, and other property received by the debtor railroads and distribute the cash proceeds. Appellant should address his claim for cash to the reorganization court after the proceedings under the Rail Act have terminated; that claim is not a basis for enjoining enforcement of the Act.

Appellant in fact is attempting to assert on behalf of the debtor railroads an alleged right to receive cash in exchange for their rail properties—a right which the estates of those railroads do not here claim. For the reason stated in the preceding paragraph, we believe appellant lacks standing to advance that claim. But we now show both that the Rail Act operates as a reorganization statute under which creditors are not constitutionally entitled to payment of their claims in cash and that the debtor railroads would not be entitled to receive cash for their rail properties even under a condemnation statute.

A. THE RAIL ACT OPERATES AS A REORGANIZATION STATUTE UNDER WHICH CREDITORS HAVE NO CONSTITUTIONAL RIGHT TO PAYMENT OF THEIR CLAIMS IN CASH

It has long been understood that the secured creditors of a railroad in reorganization are not entitled to payment of their claims in cash. See *Continental Bank* v. *Rock Island Ry.*, 294 U.S. 648 (prohibiting secured creditors of the debtor from foreclosing on their collateral). Cf. *Wright* v. *Union Central Life Insurance Co.*, 311 U.S. 273. Indeed, far from being entitled to payment in cash, secured creditors of a debtor railroad may be required to accept junior securities or even common stock of the newly reorganized railroad. See, *e.g.*, *Reconstruction Finance Corporation* v. *Denver & Rio Grande W. R. Co.*, 328 U.S. 495 (affirming a plan requiring junior creditors of the debtor to accept common stock); *Group of Investors* v. *Milwaukee R. Co.*, 318 U.S. 523 (affirming a plan requiring senior creditors of the debtor to accept junior securities or securities paying a lower interest rate); *Ecker* v. *Western Pacific R. Corp.*, 318 U.S. 448 (affirming a plan requiring senior creditors of the debtor to accept preferred and common stock); *Consolidated Rock Co.* v. *DuBois*, 312 U.S. 510 (affirming a plan requiring senior creditors of the debtor to accept junior securities).

Appellant does not contend otherwise. He argues instead that the Rail Act has converted the Penn Central reorganization proceeding into a condemnation

and liquidation proceeding, to which, he claims, different constitutional principles apply.[12] We disagree.

The Rail Act was enacted as a railroad reorganization statute intended to complement the operation of Section 77 of the Bankruptcy Act, 11 U.S.C. 205. That congressional intent is made manifest by the language of Section 207(b), which provides that "each United States district court or other court having jurisdiction over a railroad in reorganization * * * shall order that the reorganization be proceeded with pursuant to this Act unless it * * * has found that the railroad is reorganizable on an income basis within a reasonable time under section 77 of the Bankruptcy Act * * * and that the public interest would be better served by such a reorganization than by a reorganization under this Act * * *."

In a successful Section 77 reorganization, the reorganization plan generally calls for the creation of a new capital structure in which the value of the new securities is determined primarily on the basis of the railroad's projected future earnings. See 5 Collier, *Bankruptcy*, ¶77.18 (14th ed.). The new securities

[12] Appellant's argument is that the rail properties in their entirety are being condemned. We concede, of course, that any "shortfall"—*i.e.*, any difference between the constitutional minimum value of those properties and the value of the consideration received in return—could amount to a taking that would be compensable in the Court of Claims. See pp. 39–48 of our opening brief in No. 74–168. Appellant, however, demands cash payment of the entire constitutional minimum value of the rail properties, not merely of the shortfall. It is that demand we oppose here.

are distributed to the claimants against the debtor railroad on the basis of their seniority. See generally *Ecker* v. *Western Pacific R. Corp., supra.*

The method of reorganization prescribed by the Rail Act is essentially the same. But whereas Section 77 of the Bankruptcy Act basically provides a mechanism only for the separate reorganization of individual railroads, the Rail Act provides a means for an integrated reorganization of an entire regional railroad system. See Section 101(b)(2) of the Act. This system-wide reorganization is to be accomplished by an effective merger of bankrupt railroads into the Consolidated Rail Corporation pursuant to a "plan of reorganization for the restructure, rehabilitation, and modernization of railroads in reorganization." Section 102(6) of the Act. The estates of the debtor railroads will receive stock and securities in the Corporation in exchange for some or all of their rail properties; the stock and securities received from the Corporation and the other assets remaining in the estates, or the proceeds from their sale, will then be distributed among the claimants against the estates on the same seniority basis, according to the same standard of fairness and equity, as under Section 77.

It is of course clear that a railroad reorganization is not converted into a condemnation proceeding merely by virtue of the fact that it is accomplished through the merger of two or more railroads. Indeed, such mergers, although difficult to achieve, are at least theoretically possible under Section 77. See, *e.g., New Haven Inclusion Cases,* 399 U.S. 392. But appellant complains (Br. 69–76) that the merger to be effected under the Rail Act will in fact constitute

a condemnation of the rail properties of the bankrupt railroads, because (1) the federal government will share, at least temporarily, in the management of the railroad enterprise which will survive the merger, and (2) a bankrupt railroad's participation in the merger will not be conditioned upon the consent of its owners and creditors. Those features of the Rail Act do not affect its basic character as a reorganization statute. To the contrary, as we now show, they merely illustrate the "capacity of the bankruptcy clause to meet new conditions." *Continental Bank* v. *Rock Island Ry., supra,* 294 U.S. at 671.

1. The railroad enterprise which will survive the merger effected by the Rail Act will not be a federal instrumentality

The Consolidated Rail Corporation, to which the rail properties of the bankrupt railroads will be transferred pursuant to the final system plan, will be "a for-profit corporation established under the laws of a State and shall not be an agency or instrumentality of the Federal Government." Section 301(b) of the Rail Act. The common stock of the Corporation will be held privately. However, a large share of the Corporation's funding will be provided by the federal government in the form of loans from the United States Railway Association in an amount of up to one billion dollars. See Sections 210(b) and 211(c). In effect, the Association, and through it the United States, will be a major participant in the merger. In order to protect the federal government's substantial creditor interest in the Corporation, Section 301(d) of the Rail Act provides that as long as

at least 50 percent of the outstanding indebtedness of the Corporation consists of federal obligations, the Corporation's fifteen-member board of directors shall include the Secretary of Transportation, the Chairman of the Interstate Commerce Commission, the President of the Association, and five additional members to be appointed by the President with the advice and consent of Congress.[13]

Appellant concludes from this provision that "[t]he common stock of Conrail has been stripped of all the normal attributes of ownership of stock in a private enterprise" (Br. 72). Apparently implicit in this conclusion is the suggestion that the provision for federal participation in the management of the Corporation transforms the Corporation into a federal instrumentality that "takes" appellant's trust property by eminent domain. But that provision clearly has no such effect. Federal representation on the board of directors is merely a reasonable interim measure to protect the government's substantial interest as an investor. Full voting control of the Corporation will shift to the shareholders when federal obligations fall below 50 percent of the Corporation's indebtedness. Indeed, the shareholders will exercise such control from the outset of the Corporation's operations if the federal government is not at that point the majority creditor. In any event, since the

[13] The Rail Act also provides for federal audits of the Corporation and requires that the Corporation engage only in transportation-related activities so long as a majority of its indebtedness consists of federal obligations. Sections 301(f) and 302. The Corporation is also required to make annual reports to Congress. Section 301(g).

purpose of federal representation on the board of directors is merely to protect the government's financial interests, the obligation of the federally appointed directors will be no different from that of the directors chosen by the shareholders—to ensure that the corporation operates at a profit. Accordingly, notwithstanding any temporary federal participation in its management, the Corporation will be a private, not a governmental, enterprise.

It will be, moreover, a private enterprise owned by the previous owners of the rail properties transferred to it. Thus that transfer involves no "taking," by eminent domain or otherwise; the exchange of rail properties for stock and securities in the Corporation and other property effects merely a change in the form of ownership, just like any other merger or corporate reorganization. Cf. Section 368(a)(1) of the Internal Revenue Code of 1954, 26 U.S.C. 368(a)(1).

2. A reorganization plan may be imposed on a bankrupt railroad without securing the consent of its owners and creditors

Appellant contends (Br. 69–71, 84–87) that the claimants against a failing railroad have a constitutional right to terminate its rail services and liquidate its assets, and accordingly that any plan providing for a continuation of some or all of those services against the wishes of the owners and creditors, through a merger or otherwise, is a plan of condemnation rather than of reorganization. We have already shown, in our opening brief in No. 74–168 (pp. 16–37), that

the owners and creditors of a railroad may constitutionally be compelled to bear the burden of continuing its operations in the public interest for as long as there are reasonable prospects for reorganization on an income basis, and that the Rail Act holds out such prospects for the railroads in reorganization. Thus railroad investors do not possess the unqualified right of termination and liquidation that appellant asserts here.[14] And, as we now discuss, it is well established that a plan of reorganization providing for a continuation of rail services may be imposed upon a bankrupt railroad without securing the consent of its owners and creditors.

Section 77 of the Bankruptcy Act requires the reorganization court to submit the plan of reorganization to each class of claimants for approval. The Rail Act, by contrast, does not give investors an opportunity to vote on the conveyance of rail properties to the Corporation.[15] The basic reason for this difference is obvious: the economic viability of a system-wide reorganization depends upon centralization of the planning function; it would be virtually impossible to create a workable regional rail system if the investors of each debtor railroad were entitled to determine which rail properties it would transfer to the Corporation and which it would sell or retain. Moreover,

[14] Nor do other investors. Creditors have no constitutional right to foreclosure and sale; they are entitled only to the "value of the property." *Wright* v. *Union Central Life Insurance Co.*, *supra*, 311 U.S. at 278.

[15] Section 77 will, however, afford the investors an opportunity to vote on the final distribution of the assets of the estate after the merger. The Rail Act merely adds to and does not replace the basic reorganization scheme under Section 77.

such investor determinations could not in any event be made intelligently; the investors could not evaluate the stock and securities to be received in exchange without knowing the final asset structure of the Corporation, but that structure would itself depend upon the outcome of the votes. There were thus valid reasons for not providing investors with an opportunity to vote on the merger. But the denial of a vote does not entail so great a departure from prior reorganization practice as appellant suggests. Under Section 77, the reorganization plan, if approved by two-thirds of each class, may be imposed on the dissenting minority. More significantly, however, Section 77(e) authorizes the court to confirm the plan despite the disapproval of any class of claimants, if the court finds the plan to be fair and equitable. This "cramdown" provision, which allows the court to substitute its judgment for that of the investors, has been expressly upheld as constitutional by this Court. *Reconstruction Finance Corporation* v. *Denver & Rio Grande W. R. Co., supra,* 328 U.S. at 533. Thus it is clear that a railroad's investors have no constitutional right, either as individuals or as a class, to reject a fair and equitable plan of reorganization. Such a reorganization plan may be imposed on them without their consent.

This rule antedates Section 77. In equity receivership it was an accepted practice for the court to impose a reorganization plan upon objecting creditors. Section 77(e) served "merely to confer upon the District Court in its bankruptcy part a power theretofore existing in its equity part." *In re New York, N.H. & H. R. Co.,* 16 F. Supp. 504, 512 (D. Conn.). Thus Section 77(e)'s "cramdown" provision simply carries out

a long standing "public policy that the operation of railroads as sound, economic units should be achieved for the benefit of the public, regardless of the interests of creditors and stockholders." 5 Collier, *Bankruptcy*, ¶ 77.02 (14th ed.).

It is therefore clear that the mandatory nature of the merger to be effected under the Rail Act does not take that Act out of the constitutional ambit of reorganization legislation. The fact that the "cramdown" provision of Section 77(e) operates only after the investors have had an opportunity to express their views by balloting, whereas the Rail Act affords no such opportunity, is of course constitutionally insignificant. The degree of compulsion is the same whether the plan of reorganization is imposed over the objections of the investors, as under Section 77(e), or merely without seeking their approval, as under the Rail Act. That degree of compulsion, as *Denver & Rio Grande* demonstrates, does not transform a reorganization proceeding into a taking by eminent domain. Accordingly, reorganization, not condemnation, principles apply to the transfers under the Rail Act.

B. THE DEBTOR RAILROADS WOULD NOT BE ENTITLED TO RECEIVE CASH FOR THEIR RAIL PROPERTIES EVEN UNDER A CONDEMNATION STATUTE

As we have just shown, the Rail Act operates as a reorganization statute under which the creditors of the debtor railroads are not constitutionally entitled to payment of their claims in cash. But even if, as appellant contends, the mandatory conveyance provi-

sions of the Rail Act operate as a condemnation statute, and thereby cause a taking of the debtor railroads' rail properties by eminent domain, the corporation is not constitutionally required to pay cash in exchange for those rail properties.

Money is not the only constitutionally permissible form of compensation for Fifth Amendment takings. Congress may in the exercise of its eminent domain power require an exchange of property for nonmonetary compensation. For example, as this Court held in *Bauman* v. *Ross,* 167 U.S. 548, the federal government may take land in exchange, at least in part, for the benefits which the government's use of that land confers on the landowner's adjacent property (167 U.S. at 584):

> The Constitution of the United States contains no express prohibition against considering benefits in estimating the just compensation to be paid for private property taken for the public use; and * * * no such prohibition can be implied * * *.

See also *United States* v. *1,000 Acres,* 162 F. Supp. 219 (E.D. La.).

This Court's observations in other cases that a property owner is entitled to the "full monetary equivalent of the amount taken" (*Almota Farmers Elevator & Warehouse Co.* v. *United States,* 409 U.S. 470, 473; see also *United States* v. *Miller,* 317 U.S. 369, 373, and *Monongahela Navigation Co.* v. *United States,* 148 U.S. 312, 326) do not signify that the

compensation must be paid in cash.[16] Those cases concerned only the amount of compensation required to be paid, not the form in which the property owners were entitled to receive it. The phrase "monetary equivalent" in that context was merely a shorthand method of expressing the principle that a condemnee is entitled to property equivalent in value to that which was taken. That principle is fully consistent with the *Bauman* rule that the compensation may be paid, wholly or in part, in nonmonetary form.

As this Court recognized in *Bauman,* application of the just compensation clause is simply a matter of assessing, on a case by case basis, the respective values of the property taken and the compensation offered; there is no constitutional requirement that the compensation be converted into cash in all cases. Moreover, a requirement that compensation be paid in cash would be particularly inappropriate in the circumstances of this case. Under the Rail Act the debtor railroads simply contribute rail properties to the Corporation in return for indirect ownership of and claims against those same rail properties; each debtor railroad gives up an undivided interest in a part in exchange for a divided interest in the whole. This continued, although indirect, interest in the rail properties themselves is the "full and perfect equivalent of the property taken." *Monongahela Navigation Co.* v. *United States, supra,* 148 U.S. at 326.

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[16] Appellant also relies upon *Vanhorne's Lessee* v. *Dorrance,* 2 Dall. 304. The decision in that case, however, was based upon state law. See *Satterlee* v. *Matthewson,* 2 Pet. 380, 414.

III

THE ABSENCE OF ANY PROVISION FOR A PRIOR JUDICIAL DETERMINATION OF THE FAIRNESS AND EQUITY OF THE CONSIDERATION TO BE PAID FOR THE DEBTOR RAILROADS' RAIL PROPERTIES DOES NOT RENDER THE RAIL ACT INVALID

Appellant contends (Br. 93–98) that even if the mandatory conveyance provision of the Rail Act is otherwise valid, it nevertheless denies the investors procedural due process because, unlike Section 77(e) of the Bankruptcy Act, it omits any provision for a prior judicial determination of the fairness and equity of the consideration to be paid for the debtor railroads' rail properties. That omission does not render the Rail Act invalid.

1. The Rail Act provides an expedited process for implementation of the final system plan. The plan is to be certified to the special court within 90 days after its approval by Congress; the Corporation is to deposit its stock and securities in the special court within 10 days thereafter; following which the special court is to order conveyance of the debtor railroads' rail properties within an additional ten days. Sections 209(c) and 303(a) and (b). After the conveyance of the rail properties, the special court is to determine whether the consideration payable for the rail properties under the final system plan is "fair and equitable to the estate of each railroad in reorganization in accordance with the standard of fairness and equity ap-

plicable to the approval of a plan of reorganization or a step in such a plan under section 77 of the Bankruptcy Act * * *." Section 303(c)(1)(A). If the special court determines that the terms of one or more exchanges is not fair and equitable, it may under Section 303(c)(2) reallocate the securities among the debtor railroads, order the transfer of additional securities and obligations, and, if necessary, enter a judgment against the Corporation. The determination of the special court would be reviewable by this Court. Section 303(d).

Appellant is concerned that the inevitably protracted evaluation proceedings under Section 303 may not, in the end, result in the payment of constitutionally sufficient consideration to the estates of the debtor railroads, and that those estates would then be without a remedy.[17] He therefore claims the right to a preconveyance judicial determination of the fairness and equity of the consideration to be paid for the rail properties.

Appellant errs in his basic premise. The estates of the debtor railroads will not be without a remedy in the event the consideration payable under the Rail Act proves to be constitutionally insufficient. To the contrary, they will be entitled to recover any constitutional deficiency in an action under the Tucker Act in the Court of Claims (see pp. 39–48 of our opening brief in No. 74–168).

A preconveyance judicial determination of fairness and equity is therefore not necessary for the protec-

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[17] Appellant assumes, as do we, that reconveyance of all the rail properties would not be feasible.

tion of the estates' substantial rights. Due process, accordingly, does not require such a determination: "[d]ue process of law guarantees 'no particular form of procedure; it protects substantial rights.'" *Mitchell* v. *W. T. Grant Co.*, No. 72–6160, decided May 13, 1974 (slip op. 10). Thus due process requires, at most, that prior to the conveyance the debtor railroads' estates be granted judicial assurance that they will ultimately receive no less than the constitutional minimum value of their rail properties. This Court, by upholding the availability of the Tucker Act remedy, will provide that assurance and thereby afford appellant the only preconveyance judicial determination that due process requires.

2. We concede that in the absence of a Tucker Act remedy the bankrupt estates would as a group be constitutionally entitled to a preconveyance judicial determination of the fairness and equity of the total amount of consideration payable under the final system plan. We have shown above (pp. 22–23, *supra*), however, that those estates will, if necessary, be able to secure such a determination from the special court. There is therefore no basis for declaring the Rail Act "facially defective" (Appellant's Br. 98) on due process grounds.[18]

[18] Preconveyance litigation over the fairness and equity of the proposed consideration would, however, appear to require incidental invalidation of the provisions of the Rail Act that set forth an expedited schedule for implementation of the final system plan. Such litigation could be expected to be time-consuming and the court might be required, in order to preserve its jurisdiction

IV

THE RAIL ACT IS NOT INVALID AS A GEOGRAPHICALLY NONUNIFORM LAW ON THE SUBJECT OF BANKRUPTCIES

Appellant contends (Br. 99–107) that the Rail Act is void for want of geographical uniformity. The district court below rejected that contention except with respect to the provision of Section 207(b) that requires the dismissal of certain reorganization proceedings. In our opening brief in No. 74–168 (pp. 49–54), we showed that neither Section 207(b) nor any other provision of the Rail Act is invalid under the uniformity requirement of the bankruptcy clause. We merely summarize the relevant points of that argument here: (1) the Rail Act applies uniformly to all reorganizations of operating railroads and the fact that those reorganizations happen to be located in the northeastern section of the nation does not violate the requirement of geographical uniformity; (2) the uniformity requirement bars only geographical discrimination against creditors, and the Rail Act contains no such discrimination; (3) the Rail Act may in any event be sustained as a proper exercise of commerce power.

(see 28 U.S.C. 1651(a)), to enjoin the Association from certifying the final system plan, or the Corporation from depositing its stock and securities, within the 90-day and 10-day periods respectively prescribed by Sections 209(c) and 303(a).

CONCLUSION

The judgment of the district court should be affirmed insofar as it denied appellant's request for declaratory and injunctive relief.

Respectfully submitted.

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In the
Supreme Court of the United States

OCTOBER TERM, 1974

Nos. 74-165; 74-166; 74-167; 74-168

REGIONAL RAIL REORGANIZATION CASES

UNITED STATES OF AMERICA, *et al.*, Appellants

v.

CONNECTICUT GENERAL INS. CORP., *et al.*, Appellees
(No. 74-168)

UNITED STATES RAILWAY ASSOCIATION, Appellant

v.

CONNECTICUT GENERAL INS. CORP., *et al.*, Appellees
(No. 74-167)

ROBERT W. BLANCHETTE, *et al.*, Trustees of
Penn Central Transportation Company, Debtor, Appellants

v.

CONNECTICUT GENERAL INS. CORP., *et al.*, Appellees
(No. 74-165)

RICHARD JOYCE SMITH, Trustee, Cross-Appellant

v.

UNITED STATES OF AMERICA, *et al.*, Cross-Appellees
(No. 74-166)

ON APPEALS AND CROSS-APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

OBJECTION OF NEW HAVEN TRUSTEE AND PENN CENTRAL COMPANY TO MOTION OF THE NATIONAL INDUSTRIAL TRAFFIC LEAGUE FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

Each of the undersigned is a party in one or more

of the four related cases set forth above,[1] and in such capacity, each objects to the motion of the National Industrial Traffic League for leave to file a brief *amicus curiae.* The Court is urged to deny the motion for the following reasons:

1. Notwithstanding its public interest assertions, the National Industrial Traffic League's interest must be deemed, in the context of these cases, to be essentially private. Since the League did not seek intervention in the court below where its position could have been met on a party-to-party basis, it should not be allowed now to further its private interest in these cases without having the responsibilities of a party.

2. Even if, *arguendo,* the League's interest were deemed to be more public than private, the public interest is already protected in these cases by the parties. In addition, the undersigned have not opposed the motion of certain Members of Congress to file a brief as *amici curiae.*

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[1]Richard Joyce Smith, as Trustee of The New York, New Haven and Hartford Railroad Company, Debtor, is the cross-appellant in No. 74-166 and an appellee in Nos. 74-165, 74-167 and 74-168; Penn Central Company is an appellee in Nos. 74-165, 74-167 and 74-168.

CONCLUSION

The motion of National Industrial Traffic League to file a brief *amicus curiae* should be denied.

October 1, 1974

Respectfully submitted,

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